

WILLKIE FARR & GALLAGHER

DOCKET FILE COPY ORIGINAL

Washington, DC
New York
London
Paris

April 23, 1997

RECEIVED

APR 23 1997

Federal Communications Commission
Office of General Counsel

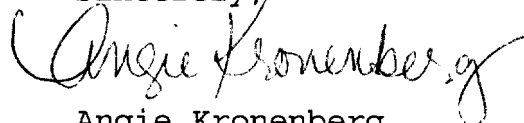
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20054

Re: CC Docket No. 97-121

Dear Mr. Caton:

Pursuant to the request of Michelle Carey of the FCC's Common Carrier Bureau, Sprint Communications Company L.P. hereby files the Oklahoma Administrative Law Judge's Report and Recommendations concerning Southwestern Bell Telephone Company's Section 271 authority.

Sincerely,


Angie Kronenberg

Enclosure

cc: Michelle Carey

No. of Copies rec'd _____
By: ABCDE

OKZ

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF ERNEST G. JOHNSON,)
 DIRECTOR OF THE PUBLIC UTILITY)
 DIVISION, OKLAHOMA CORPORATION) CAUSE NO. PUD 970000064
 COMMISSION TO EXPLORE THE)
 REQUIREMENTS OF SECTION 271 OF)
 THE TELECOMMUNICATIONS ACT OF 1996)

HEARING: April 15, 1997 before the Administrative Law Judge

APPEARANCES: Jack P. Fite, Michelle S. Bourianoff, and Kathleen M. LaValle,
 Attorneys,
 AT&T Communications of the Southwest, Inc.
 Roger K. Toppins and Austin C. Schlick, Attorneys
 Southwestern Bell Telephone Company
 Nancy M. Thompson and Martha Jenkins, Attorneys
 Sprint Communications Company L.P.
 Ronald D. Stakem and Stephen F. Morris, Attorneys
 MCI Telecommunications Corporation
 Fred Gist, Attorney
 Brooks Fiber Communications
 Jennifer Johns, Attorney
 Cox Communications Company
 Mickey S. Moon and Dara Derryberry Prentice, Attorneys
 Office of the Attorney General, State of Oklahoma
 John Gray, Senior Assistant General Counsel, Public Utility Division
 Oklahoma Corporation Commission

REPORT AND RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGEProcedural History

This docket results from Section 271(d)(2)(B) of the federal Telecommunications Act of 1996 (the federal Act), which requires the Federal Communications Commission, before it makes a determination under Section 271 with respect to whether a Bell operating company should be authorized to provide interLATA services in an in-region state, to consult with this Commission "in order to verify the compliance of the Bell operating company with the requirements of subsection [271] (c)."

On February 6, 1997, the Director of the Public Utility Division filed this application. In his application, the Director requested the Commission to "initiate a proceeding to determine what information the Commission will need in order to consult in a meaningful way with the Federal Communications Commission ("FCC"), as required by 47 U.S.C. Section 271(d)(2)(B), if, and when, Southwestern Bell Telephone Company ("SWBT")¹ requests FCC authority to

¹ References to "Southwestern Bell" may refer to Southwestern Bell Telephone Company, SBC Communications Inc., and/or Southwestern Bell Long Distance, depending on the context.

Post-It™ brand fax transmittal memo 7671		Page 1 of 1	
To: <i>Martha Jenkins</i>		From: <i>Nancy Thompson</i>	
Cc: <i>John Gray</i>		Cc: <i>John Gray</i>	
Dept: <i>Public Utility Division</i>		Phone: <i>913 624 5504</i>	

provide interLATA authority." The Director noted in his Application that in the spring of 1996, both the FCC and the Department of Justice ("DOJ") encouraged the state commission in each respective state to open a docket prior to the Bell Operating Company making application with the FCC. The Director indicated that the rationale for requesting such action was the FCC's and DOJ's concern that the short time frame allowed under the Act would be insufficient to conduct a complete review of all of the relevant information. The Director further noted that the FCC and DOJ recommended that a full evidentiary hearing be conducted by the various state commissions and that, thereafter, the record in the respective cause be submitted to them for their review. Finally, the Director noted that the Respondent named in the Application, Southwestern Bell Telephone Company ("SWBT"), is the only Bell Operating Company providing local exchange service in Oklahoma, and that it appeared from recent actions taken by SWBT that SWBT was preparing to file an application with the FCC seeking interLATA authority. Based upon this indication, the Director indicated his desire to begin the process of gathering the information to be utilized by the Commission in its consultation with the FCC.

Several motions to intervene, both oral and written, were made and granted by the Commission. On February 7, 1997, AT&T filed a Motion to Establish Advance Notice Requirement. In its motion, AT&T requested that the Commission require that Southwestern Bell Telephone Company notify the Commission and intervenors ninety days, or any other time period that the Commission deems appropriate, in advance of SWBT's intended filing date of its Section 271 application with the FCC and require that SWBT include with the notification the narrative statement and all evidence that SWBT will rely on in supporting its FCC filing. AT&T stated in its motion that similar requirements had been recommended by NARUC and adopted by the Texas PUC.

SWBT filed a response to this motion on February 12, 1997. In its response, SWBT noted that nothing in the federal Telecommunications Act requires such advance notice and that other states which have adopted such a requirement are violating the Act by making such a requirement.

AT&T's motion was heard on February 13, 1997 and was orally granted. An oral appeal was taken on February 13, 1997, at which time the Commission directed the parties to continue

discussions in an effort to resolve the issue and to reach agreement on a procedural schedule.

On February 14, 1997, AT&T filed a Motion to Establish Procedural Schedule, including a proposed procedural schedule. On February 18, 1997, SWBT filed a proposed procedural schedule. In its proposal, SWBT indicated that it was willing to provide reasonable advance notice of its intent to seek interLATA relief pursuant to Section 271 of the Act, along with the latest draft of its Section 271 filing package. SWBT stated that it believed that 30-40 days advance notice would be reasonable. SWBT also proposed that the Commission should utilize its rulemaking procedures in this docket with the addition of permitting Staff to submit written requests for information to SWBT and other parties. A hearing on the motion was held on February 19, 1997, and a procedural schedule was issued in Order No. 409094 on February 28, 1997. The Procedural Schedule noted that SWBT had agreed to provide the Commission and intervenors with advance notice of the latest draft of its Section 271(c) petition and supporting documentation it intended to file with the FCC. The procedural schedule allowed all parties, at each party's sole discretion, to file prefiled testimony and/or written comments regarding SWBT's Section 271(c) petition and supporting documentation and issues related thereto, along with the opportunity to file prefiled rebuttal testimony and/or reply comments. The procedural schedule also included provisions relating to discovery and submission of witness lists, and established dates for the hearing before the Administrative Law Judge, as well as dates for oral appeals, if any, before the Commission en banc. Finally, the Procedural Schedule noted that on or after April 11, 1997, SWBT, at its option, may file its Section 271 petition at the FCC. Also on February 28, 1997, by Order No. 409095, the Commission entered a Protective Order protecting claimed proprietary and/or confidential information of SWBT.

On March 28, 1997, AT&T filed a Motion to Take Depositions, to Modify Order, and to Shorten Notice Provision. AT&T's motion requested an order permitting depositions to be taken of individuals whose affidavits would be submitted to the FCC in support of SWBT's Section 271 application. AT&T also requested that the April 1 deadline for taking depositions be extended to April 11 and that the normal five-day notice of deposition be shortened to permit the depositions to occur on two-day notice. On April 2, 1997, SWBT filed an opposition to the motion, noting that all parties were aware within the time for discovery that SWBT would not be

calling witnesses at the hearing. The motion was heard on April 3, 1997, and by Order No. 411069, issued on April 8, 1997, the motion was denied.

On April 3, 1997, AT&T also filed a motion to compel answer to RFIs objected to by SWBT. At the April 3, 1997 hearing on this motion, the parties indicated that they had reached an agreement on the issues included in the motion and based upon the agreement of the parties, the motion was dismissed. Order No. 411068, dismissing the motion to compel, was issued on April 8, 1997.

The hearing on the merits was held on April 15, 1997. Commission Staff attorney John Gray indicated that the purpose of this proceeding is to gather information for the Commission to use in its consultation with the FCC. He indicated that in telephone conversations with the FCC concerning Southwestern Bell's application filed with the FCC, the FCC requested that all documents submitted in this proceeding be submitted to them for their review as well. Mr. Gray requested that each party submit two copies of each of the documents it submitted in this proceeding along with a computer diskette of the document. These copies will then be delivered by the Commission to the FCC and the Department of Justice.

At the commencement of the hearing, SWBT offered into the record a copy of the FCC application as it was finalized and filed with the FCC. Several parties objected to this offer on the grounds that the filing was untimely under the procedural schedule and that SWBT should not be permitted to introduce evidence in light of its decision not to prefile testimony or produce witnesses for cross examination. The parties also argued that the comments filed by SWBT in this docket could not be considered as evidence in this case pursuant to OAC 165:5-13-3(j). The objections were overruled, with the ALJ noting that the parties previously had been advised that updated versions of SWBT's draft FCC application might be made. The ALJ further noted that all parties agreed to a procedural schedule which allowed each party to choose whether to file comments or prefiled testimony. Finally, the ALJ noted that OAC 165:5-13-3(c) provides that the Commission follows the statutory rules of evidence, but has the authority to relax these rules, and noted that the reference in OAC 165:5-13-3(j) to comments not being considered as evidence of disputed facts applies to public comments only. The ALJ also noted that the form of

the submissions would have a bearing on the weight, not the admissibility of, the parties' filings. MCI was granted leave to file a late-filed exhibit noting the basis for its objection to this ruling.

Each party was allowed to make an oral presentation of its position, and those parties who prefiled testimony were allowed to present their witnesses. The ALJ noted that since the burden was on SWBT, it would be allowed to proceed first and to present a closing statement at the end of the presentations by other parties.

SWBT made an oral presentation of its position but produced no witnesses. AT&T made an oral presentation of its position. All parties waived cross-examination of AT&T's five witnesses and AT&T's prefiled testimony and witness summary statements were admitted into the record. Sprint made its oral presentation, and submitted a summary of the pre-filed testimony of each of its two witnesses. All parties waived cross-examination of Sprint's witnesses and Sprint's pre-filed testimony and written summaries of the testimony were admitted into the record. MCI made an oral presentation of its position. Brooks made an oral presentation of its position and Brooks witness Ed Cadieux was cross-examined by the AG and by SWBT. Cox Communications then made an oral presentation of its position, followed by the AG's oral presentation of his position. SWBT then made its closing statements, followed by Commission staff indicating that it would reserve the right to argue for and/or against the ALJ's ruling at the oral appeal in this cause, which is set for April 23, 1997 at 9:30 a.m.

Summary of the Parties' Positions

The parties submitted summaries of their respective positions.

Southwestern Bell Telephone Company ("SWBT") In its filings and its presentation before the Administrative Law Judge, Southwestern Bell argued that there are two basic requirements it must meet under subsection 271(c) to qualify for interLATA authority. First, SWBT must hold out to its local competitors terms for interconnection and network access, in the form of: (A) a state-approved agreement (or agreements) with a qualifying, facilities-based competitive local exchange carrier ("CLEC"); or (B) an effective statement of generally available terms and conditions ("STC"). This requirement is set forth in subsection 271(c)(1). Second, the

terms under which SWBT provides or offers interconnection and network access must satisfy the so-called 14-point "competitive checklist" set forth in subsection 271(c)(2).

Section 271 Competition Standard

SWBT stated that in order to qualify for interLATA entry in Oklahoma under section 271, Southwestern Bell must provide/generally offer access and interconnection to competitors through approved interconnection agreement(s) or an effective STC. The Act contains no requirement that there be "meaningful" or "effective" competition, or that there be "competition across substantial portions of the state." By the same token, there is no requirement that the Bell operating company have lost any particular amount of market share to local exchange competitors and no requirement that there be particular competitors in operation, such as AT&T, before the Bell operating company can qualify for interLATA relief.

SWBT further stated that legislative history demonstrates that Congress explicitly rejected "effective competition" tests. For example, Sen. Kerrey proposed an amendment that would have changed section 271(c)(1) to provide that "a Bell operating company may provide interLATA services in accordance with this section only if that company has reached interconnection agreements under section 251...with telecommunications carriers capable of providing a substantial number of business and residential customers with" service. 141 Cong. Rec. S8310, S8319 (daily ed. June 14, 1995). Sen. Kerrey's proposed amendment was defeated, as was a House amendment that would have required competitors to offer local services to 10 percent of customers as a prerequisite to Bell company interLATA entry. 141 Cong. Rec. H8425, H8454 (daily ed. Aug. 4, 1995)(statement of Rep. Bunn).

As stated by Southwestern Bell, the test intended by Congress to be applied under section 271 is "a test of when markets are open" as measured by the specific statutory criteria. 141 Cong. Rec. S8188, S8195 (daily ed. June 12, 1995)(statement of Sen. Pressler). That test is met if Southwestern Bell complies with Section 271(c). Southwestern Bell urged the Administrative Law Judge to recommend that the Commission reject the arguments of intervenors who contend that Southwestern Bell must meet some further test of local competition in order to qualify for interLATA authority.

Compliance with Subsection 271(c)(1)

Southwestern Bell argues it satisfies the requirements of subsection 271(c)(1) by reason of its binding and approved interconnection and access agreement with Brooks Fiber Communications ("Brooks Fiber"), and through its effective STC.²

SWBT states that Brooks Fiber owns fiber-optic networks and switches in Tulsa and Oklahoma City and has informed the Commission that it has "actually completed interconnection and started to pass live traffic in mid-January with Southwestern Bell" in Oklahoma City and Tulsa. Brooks Fiber currently serves multiple business customers entirely over its own network in Oklahoma City and Tulsa; residential users in both locations are served on a resale basis. Southwestern Bell argued that Brooks Fiber offers both business and residential service entirely over its own network through its General and Local Exchange Tariffs. Based on this showing, Southwestern Bell concludes that Brooks Fiber is a facilities-based provider of telephone exchange service within the meaning of subsection 271(c)(1)(A).

Southwestern Bell maintains that, if Brooks Fiber somehow is not a qualifying facilities-based provider of telephone exchange service under subsection 271(c)(1)(A) then, by reason of its effective STC, Southwestern Bell necessarily meets the requirements of subsection 271(c)(1)(B). Specifically, if Brooks is not a qualifying local exchange carrier under subsection (c)(1)(A), then no CLEC which is providing or offering telephone exchange service exclusively or predominately over its own facilities has requested to negotiate an agreement with SWBT under section 252 of the Act. Because no "such provider" has requested the access and interconnection described in subparagraph (c)(1)(A), and because it has an effective STC, Southwestern Bell argues that it is entitled to proceed under (c)(1)(B).

Finally, on the issue of compliance with section 271(c)(1)(A) or (B), Southwestern Bell argued that it has met the requirements for interLATA relief regardless of which "Track" applies. Southwestern Bell urged the Administrative Law Judge to find that Southwestern Bell

² On January 15, 1997, SWBT filed an application in Cause No. PUD 970000020 seeking approval of its Statement of Generally Available Terms and Conditions along with a copy of its proposed STC. The STC became effective on March 17, 1997, 60 days after it was filed.

has met the requirements of section 271(c)(1), both through its interconnection agreement with Brooks Fiber and its effective STC.

Compliance with Subsection 271 (c)(2)

Based on its effective STC; its approved interconnection agreements; its Initial Comments filed March 11, 1997 and Reply Comments filed March 25, 1997; and its FCC Application and accompanying affidavits,³ Southwestern Bell argued that it meets each and every one of the 14 checklist requirements, as follows:

- 1&2. "Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" and "Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)":

SWBT contends that its STC satisfies these two conditions by offering local interconnection and access to unbundled network elements of equal quality, at any technically feasible point, at cost-based rates. Such interconnection and nondiscriminatory access also is available to Brooks Fiber under the terms of its interconnection agreement with SWBT.

In response to complaints by Brooks Fiber related to technical implementation of collocation, Southwestern Bell argued that any delays were as a result of order revisions and changes in the requirements for electrical power made by Brooks. Further, SWBT expects to complete each of the requested collocations no later than one week after the original target date given to Brooks Fiber when it placed its orders last December, and before that target date in most cases.

In response to claims by AT&T that SWBT will make unnecessary disconnections when a residential customer moves from SWBT POTS service to a CLEC service that uses a POTS equivalent unbundled network elements (whether due to treatment of the change as a "designed service" or otherwise), SWBT argued that there may be unavoidable (generally very brief) service outages as a necessary result of customer choices to change carriers and/or establish unbundled elements. SWBT contends that such necessary responses to customer requests cannot be considered "disruptions" of service and SWBT policy is that service outages will be kept to the minimum necessary to fulfill the order.

SWBT addressed complaints from intervenors relating to its provision of OSS by contending that it stands ready to provide any requesting CLEC, including AT&T, access to SWBT's OSS functions that is equivalent to the access provided to SWBT personnel for processing SWBT orders. Additionally, SWBT states that it has been working with AT&T and other

³ A complete copy of Southwestern Bell's Application for Provision of In-Region, InterLATA Services in Oklahoma, filed with the FCC on April 11, 1997, was admitted into the record of this proceeding over objections at the hearing before the Administrative Law Judge on April 15, 1997. Drafts of Southwestern Bell's brief and accompanying draft affidavits were made available to the Administrative Law Judge and the parties on February 20, 1997. The draft brief and draft affidavits were not admitted into the record.

CLECs to implement new OSS capabilities requested by those carriers and will complete that implementation in a timely manner in compliance with the Act. Finally, SWBT argues that its OSS have been designed and tested to support significant commercial activity by CLECs in the same manner as those systems support SWBT retail service ordering.

The affidavit of William C. Deere states how SWBT has satisfied the network-related elements of the competitive checklist, including the requirements for interconnection and non-discriminatory access to unbundled network elements; SWBT's provision of nondiscriminatory access to its OSS functions is detailed at length in the affidavits of Elizabeth A. Ham, Nancy J. Lowrance and Linda D. Kramer. The affidavit of Dale Kaeshoefer also discusses satisfaction of these items, including pricing requirements.

3. "Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned, or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224":

SWBT argues that the affidavit of James A. Hearst indicates that SWBT offers nondiscriminatory access to its poles, ducts, conduits and rights-of-way in accordance with section 224 through both its STC and its agreements with Brooks Fiber and ICG.

4. "Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services":

SWBT argues that, as detailed in the Kaeshoefer and Deere affidavits, both SWBT's STC and its agreement with Brooks Fiber make local loop transmission available in compliance with the Act.

5. "Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services":

SWBT contends that both SWBT's STC and its agreement with Brooks Fiber make common and dedicated interoffice transport available as unbundled network elements in compliance with the Act, and that SWBT therefore meets this checklist item. SWBT submits that information supporting this statement is contained in the Deere and Kaeshoefer affidavits.

6. "Local switching unbundled from transport, local loop transmission, or other services":

SWBT submits that its STC meets this requirement by offering CLECs line-side and trunk-side facilities, as well as the features, functions, and capabilities of the switch. SWBT also argues that the Brooks Fiber agreement also provides unbundled access to local switching. Information concerning this checklist item is also contained in the Deere and Kaeshoefer affidavits.

7. "Nondiscriminatory access to...911 and E911 services; directory assistance services...and operator call completion services":

SWBT states that all parties accept that SWBT makes nondiscriminatory access to these checklist items -- including DA services -- available through its STC and its approved interconnection agreement with Brooks Fiber. SWBT further states that Brooks Fiber and SWBT began passing live 911 traffic in January 1997. SWBT states that upon request, SWBT will implement DA and OS services for competing CLECs in exactly the same manner as they have been furnished for many years to 39 independent telephone companies in Oklahoma under similar contracts. SWBT states that compliance with these requirements is detailed in the affidavits of Richard Keener, William C. Deere and Dale Kaeshoefer.

8. "White pages directory listings for customers of the other carrier's telephone exchange service":

SWBT argues that the affidavit of Debrah Baker-Oliver indicates that SWBT's STC makes White Pages listings available to customers of both resellers and facilities-based carriers as if they were SWBT customers. SWBT further argues that its interconnection agreement with Brooks Fiber also provides nondiscriminatory access to SWBT's White Pages directory listing and distribution services.

9. "[N]ondiscriminatory access to telephone numbers...":

In its role as the Central Office Code Administrator in its five-state operating area, SWBT states that it has followed industry-established guidelines promulgated under the auspices of the FCC. SWBT further states that its STC continues this practice, guaranteeing compliance not only with the Act, but also with any guidelines issued by the FCC until such time as numbering administration is taken over by a neutral third party. SWBT contends that nondiscriminatory access to telephone numbers is also available to Brooks pursuant to its interconnection agreement with SWBT.

With respect to SWBT's practices for the assignment of NXX codes, SWBT argues that the affidavit of William T. Adair establishes that all such practices are in accord with industry standards. Mr. Adair's affidavit further states that other than as required by the industry-developed jeopardy assignment plan for the Oklahoma 405 NPA, no requests for codes by a CLEC in Oklahoma has been denied by SWBT, in its role as the Code Administrator, for any reason.

10. "Nondiscriminatory access to databases and associated signaling necessary for call routing and completion":

SWBT argues that it exceeds the requirements of this section by providing unbundled access to signaling and various databases. In particular, SWBT's STC and its agreement with Brooks provides unbundled access

to its Toll Free Calling (800 and 888) Database on non-discriminatory terms. This information is contained in the affidavit of William C. Deere.

11. "[I]nterim number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements...":

SWBT argues that its STC provides interim number portability in accordance with the requirements of the Act by offering CLECs a choice of either remote call forwarding or direct inward dialing. SWBT's interconnection agreement with Brooks Fiber also includes the provision of interim number portability.

SWBT also argued that with respect to complaints by Brooks Fiber related to technical implementation of INP, the difficulties experienced by Brooks Fiber resulted from its own failure to follow the procedures for submitting INP orders. Those procedures were furnished to Brooks in April of 1996 when SWBT provided it with a handbook entitled *How to do Business with SWBT: A Handbook for Switched Based Local Service Providers*. Additionally, in October, 1996, Brooks Fiber personnel attended an overview session on ordering procedures, and subsequently attended a workshop specifically designed to teach CLECs ordering procedures.

SWBT states that the affidavits of William C. Deere, Dale Kacshoefer and Debrah Baker-Oliver detail SWBT's provision of INP to CLECs through its STC and approved agreements.

12. "Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3)":

SWBT states that, as set out in various affidavits supporting SWBT's FCC application, SWBT's STC and its agreement with Brooks Fiber offer requesting CLECs access to the information necessary to implement local dialing parity, as well as nondiscriminatory access to telephone numbers, operator services, directory assistance and directory listings with no unreasonable dialing delays.

13. "Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)":

SWBT contends that the Deere and Kacshoefer affidavits indicate that SWBT's STC fulfills this checklist requirement. It offers reciprocal rates for both tandem office-based and end office-based transport and termination of local traffic originating on the CLEC's network in accordance with section 252(d)(2) and the FCC's pricing rules, which have been stayed by the U.S. Court of Appeals for the Eighth Circuit. SWBT further argues that its interconnection agreement with Brooks Fiber, USLD, ICG and Sprint also comply with this requirement.

14. "Telecommunications services...available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)";

By incorporating the 19.8 percent wholesale discount ordered by the Commission in the SWBT/AT&T arbitration docket, Cause No. PUD 960000218, SWBT states that its STC offers CLECs wholesale rates for any services SWBT offers to its retail customers in accordance with the Act. Pursuant to the terms of its interconnection agreement with SWBT, Brooks Fiber also has access to resale of SWBT services at the 19.8 percent discount. Evidence concerning this checklist item is contained in the Deere and Kaeshofer affidavits.

Southwestern Bell argued the checklist items described above are equally available on a nondiscriminatory basis to all competing local exchange carriers either through the STC, or through negotiated agreements. SWBT argues that there is no requirement that checklist items be made available on a "commercially operational" basis.

Southwestern Bell further noted the provision of Section 271(d)(4) that the Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B). Southwestern Bell maintains that its affidavits, its Initial Comments and Reply Comments in this proceeding and its FCC Application address the objections raised by intervenors, and demonstrate that it meets the requirements of the Act for interLATA relief. Southwestern Bell maintains that the remaining objections of the intervenors, some of which were asserted for the first time at the hearing before the Administrative Law Judge, represent nothing more than attempts to slow Southwestern Bell's entry into the interLATA market through relitigating matters decided in arbitration and otherwise seeking to "extend the terms used in the checklist" in violation of the Act.

Pricing Issues

Southwestern Bell maintains that the network element rates available through its interconnection agreements and contained in its STC are cost-based in accordance with section 252(d). Specifically, SWBT argues that the rates were derived based on a forward-looking cost study, or by adopting tariffed or contractual rates that are themselves cost-based. Many of the rates contained in the STC were approved by the Commission in the AT&T arbitration, Cause

No. PUD 960000218. The STC and certain Commission-approved agreements contain the 19.8% resale discount established in the AT&T Arbitration.

Public Interest Issue

Southwestern Bell noted that this Commission's responsibilities under the consultation provision of subsection 271(d)(2)(B) do not extend to whether this Commission believes Southwestern Bell's entry into the interLATA long distance business in Oklahoma is in the public interest.

However, to the extent the Commission finds the public interest to be a relevant area of inquiry under the Act, Southwestern Bell argued that the additional consumer choice resulting from Southwestern Bell's entry into the interLATA long distance business in Oklahoma is in the public interest. Moreover, it is consistent with this Commission's policy of opening all telecommunications markets to competition, a policy that has recently been implemented to open up intraLATA competition (Cause No. PUD 910001159), local exchange competition (Cause No. RM 950000019), payphone competition (Cause No. RM 960000013), special access and private line competition (Cause Nos. PUD 940000486, 950000139 and 950000140).

Southwestern Bell also argued that the promotion of additional long-distance competition, brought about by the entry of Southwestern Bell in the interLATA market, is in the public interest, and is consistent with the intent of Congress in enacting the Act. For example, Senator Harkin observed that "by removing barriers between distinct telecommunications industries and allowing everyone to compete in each other's business," the Act will allow consumers to benefit from "low cost integrated service with the convenience of having only one vendor and one bill to deal with." 142 Cong. Rec. S687, S713-14 (daily ed. Feb. 1, 1996).

It was Southwestern Bell's position that the WEFA Group study (among other evidence) demonstrated the potential beneficial effects of Southwestern Bell's entry into the interLATA long distance market in Oklahoma. Specifically, that study projected Southwestern Bell's entry into the interLATA long distance market would result in the creation of more than 10,000 jobs in Oklahoma, and an increase of more than \$700 million in the State's Gross Product by the year 2006.

AT&T Communications of the Southwest, Inc. ("AT&T") AT&T introduced evidence to demonstrate that SWBT has not complied with the competitive checklist. AT&T's evidence was of two types: sworn prefiled statements of Robert V. Falcone, Steven E. Turner, Phillip Gaddy, Nancy Dalton and Mark Lancaster that were introduced at the hearing, either by having the witness take the stand or by stipulation, and answers to data requests served in this case.

The following witnesses appeared in person to testify on behalf of AT&T: Steven Turner, Phillip Gaddy and Nancy Dalton.

AT&T presented evidence on the state of competition in Oklahoma and each of the items on the competitive checklist.

Steven Turner testified that: (1) facilities-based competition in Oklahoma today is extremely limited; (2) resale constitutes only a very limited form of competition; (3) the importance of facilities-based competition as a check on the anticompetitive behavior of LECs and the critical role of UNEs to the development of facilities-based competition; and (4) SWBT's pricing of UNEs is a major barrier to the development of facilities-based competition in Oklahoma.

Turner testified that Brooks Fiber is the only competitor that has interconnected with SWBT. Brooks serves 20 business customers, and 4 residential customers in Oklahoma. All four of the residential customers are provided through resale of SWBT service and on a test-basis. Brooks does not purchase any unbundled loops from SWBT to provide service to its business customers, but instead purchases DSIs at retail, because the cost is less than the cost of unbundled elements and because of problems obtaining collocation from SWBT. Brooks reports that it is having difficulties with SWBT's provisions of access and interconnection. Brooks is pursuing several physical collocations with SWBT, and in each case, Brooks has had to wait longer and pay more than it expected. Brooks has yet to have a collocation order processed to completion, despite having initiated requests as early as June of 1996. SWBT has also run into problems implementing number portability for Brooks' customers, resulting in service outages for virtually all of Brooks' customers.

Turner also testified that in order to establish a competitive environment in Oklahoma, access to unbundled network elements is absolutely critical. Resale alone is not effective

competition, and restricts the ability of competitors to bring new services to the market. Unbundled network elements, and specifically the UNE Platform, is the primary means by which competitors can bring effective competition to the local market without building redundant networks. The Platform allows a new entrant to purchase all of the features, functions and capabilities provided by means of an unbundled element and to introduce a new package of features contained within an element that is not limited to the LEC's packaging or pricing. Turner testified that SWBT is attempting to discourage use of the Platform through its pricing of UNEs. Turner stated that his analysis of the pricing of UNEs demonstrates that margins for residential services for a competitor using UNEs are always negative, and the margin for business services are wholly inadequate to create facilities-based competition.

AT&T also introduced into the record as part of sealed Exhibit 80 a document entitled *Retail/Unbundling decision triggers and Switch/No Switch triggers*, which was produced by SWBT in response to Data Request No. 1.1 and designated highly sensitive confidential. Data Request No. 1.1 requested copies of SWBT reports, studies, or analyses regarding inter alia the likely entry, success or rate of growth of competitors or potential competitors.

Robert Falcone and Steven Turner testified that SWBT has failed to comply with the following network-related competitive checklist items: access to UNEs generally; interconnection, including collocation; unbundled local transport; unbundled local switching; and unbundled local loop transmission.

With regard to access to UNEs, Falcone and Turner testified that SWBT, through its interconnection agreements and its Statement of Generally Available Terms (SGAT), imposes limitations on a competitor's effective access to and use of unbundled network elements. This testimony stated that SWBT treats all orders for UNEs as "disconnect/reconnect" orders for "designed services"—even when services being provided by SWBT to its customer and those provided to the customer by a competitor will be identical. Such approach by SWBT results in unnecessary service interruptions, unwarranted additional nonrecurring charges, potential operations support system overloads, and loss of automated loop testing. No technical reason justifies this approach.

Falcone and Turner further testified that SWBT is not fully implementing interconnection or local switching. Collocation is central to interconnection with an incumbent LEC. SWBT has refused to provide firm commitments on the length of time it will take to respond to a request for physical collocation or to prepare a collocation cage and on the nonrecurring or monthly costs for collocated space. SWBT also refuses to commit to providing DS1 trunk ports at known rates in its interconnection agreements. Without DS1 trunk ports, customized routing is unavailable and new entrants will not be able to serve large PBX customers that need a T1.

The testimony of Nancy Dalton described the negotiations process between AT&T and SWBT and discussed SWBT's failure to comply with the operations support systems requirement of the competitive checklist, as well as 911, E911, Directory Assistance and Operator Call Completion. Because SWBT delayed discussions regarding controversial issues such as UNEs and OSSs, arbitration awards have not provided sufficient details on those issues to develop comprehensive interconnection agreements. During AT&T and SWBT negotiations to incorporate arbitration awards into interconnection agreements, SWBT has taken the position that: 1) UNE Platform orders would require disruption of customer service; and 2) OSS capabilities for pre-ordering, installation and repair and maintenance for customers of competitors would not be at least equal to what SWBT provides its own customers.

With regard to operational support systems, Nancy Dalton testified that while AT&T and SWBT have reached high-level agreement regarding the types of operational support systems and gateways to be implemented, they have not been fully developed, tested or implemented in the resale environment, and in the UNE environment, matters remain at the negotiations level. In the UNE environment, AT&T and SWBT have not yet reached the point of being able to fully define requirements and to code and develop systems. It does appear, however, that even when requirements are developed, the OSSs SWBT is providing will not support complex business orders or "as is" migrations in an UNE environment. Dalton testified that SWBT cannot be said to be fully implementing the operational support systems requirement of the competitive checklist without provisioning these critical elements of OSSs.

With regard to 911, E911, Directory Assistance and Operator Call Completion, Dalton testified that no implementation to demonstrate these capabilities has yet occurred.

Mark Lancaster testified that SWBT has not met the requirements of the competitive checklist with regard to four numbering and numbering-type issues: number administration, number portability, local dialing parity, and toll dialing parity.

Lancaster testified that SWBT is not providing nondiscriminatory access to numbers in compliance with section 271 of the federal Act. Key deficiencies include the fact that NXX migration charges made generally available by SWBT in the SGAT are too high, and SWBT's number administration procedures are not subject to review at the state level to insure regulatory compliance.

Lancaster further testified that SWBT is not fully implementing the interim number portability requirement of the competitive checklist. SWBT offers only RCF and DID as INP solutions, both of which have inherent shortcomings with regard to the use of certain CLASS features, Caller ID, or ISDN. SWBT should be required to provide Route Index (RI) solutions. Other onerous INP provisions include performance intervals for changeovers that exceed new service intervals given to SWBT customers, restrictions on NP availability due to bill collection shortcomings, billing intercept charges to competitors, and competitively non-neutral prices.

Lancaster further testified that SWBT has provided no evidence or details regarding its implementation of local dialing parity other than vague promises of its intent to provide. Similarly, SWBT has not provided any information to establish that it can provide IntraLata 1+ toll dialing parity, and specifically has not indicated that it will implement the full 2-PIC method required by the FCC. Until SWBT provides details regarding its implementation of local and toll dialing parity, it has not complied with the checklist or satisfied public interest concerns.

These concerns with interim number portability are consistent with Brooks Fiber's actual experience in Oklahoma. See Exhibit 79, Brooks Fiber Communications' Response to AT&T Data Request No. 1.1. Brooks' experience is that for almost every customer (approximately 12) for whom Brooks has activated service using INP, Brooks has experienced problems, including service outages where customers have not received incoming calls. From Brooks' investigation, it is their assessment that SWBT processes orders for service using INP into two steps, a

disconnect of SWBT service and an activation of call forwarding to a number resident in Brooks' switch, and SWBT is not coordinating the timing of these two steps. Because of these problems, Brooks has had to monitor SWBT's INP implementation very closely to reduce the potential for and length of service outages.

The testimony of Phillip L. Gaddy summarized many areas of SWBT's failure to comply with the Section 271 competitive checklist based on his own review and that of others who filed Statements on behalf of AT&T in this proceeding. Gaddy testified that SWBT has not offered rates determined by the Commission to be cost based.

Gaddy testified that SWBT is not providing nondiscriminatory access to poles, ducts, conduits, and rights-of-way. SWBT imposes unreasonable delays in providing access to records and unnecessary costs to have SWBT employees oversee work performed by authorized contractors and perform pre-license services which have not been requested by the CLEC.

Gaddy further testified that SWBT is not fully implementing the local switching element of the competitive checklist. SWBT requires that new entrants must negotiate new license agreements with SWBT's vendors, even though SWBT has already negotiated the agreements, paid the fees, and is merely leasing the use of the facilities to another provider. Gaddy testified that this is an especially onerous requirement in cases in which SWBT is also the manufacturer of the equipment.

Gaddy also testified that SWBT is not complying with the reciprocal compensation or resale requirements of the competitive checklist. SWBT's rates for reciprocal compensation are not cost-based. Gaddy testified that additionally, SWBT defines local traffic to exclude optional extended area service (EAS) traffic as it applies to reciprocal compensation. This allows SWBT to further impede the development of competition and discriminate against other telecommunications providers. This failure to treat optional EAS traffic as local when combined with SWBT's ability to impose excessive access charges results in the pricing of retail services in a manner that could reduce competitors' margins to nothing while preserving a substantial margin for SWBT.

Gaddy further testified that the resale provisions offered by SWBT in Oklahoma do not comply with Section 271. Under the terms of each of SWBT's existing interconnection agreements and SGAT, SWBT will impose a tariff restrictions, limitations, and conditions on the use and resale of its retail services. Gaddy testified that the FCC has determined that this is inconsistent with the pro-competitive intent of the federal Act. Accordingly, by imposing these resale restrictions, SWBT is per se not fully implementing the competitive checklist. SWBT also fails to make available for resale -- even at a retail rate -- promotions of 90 days or less.

AT&T also introduced as comments the Statements of Dan Keating, Denise Crombie, Joe Gillan, Frederick Warren-Boulton, John Mayo and Ed Rutan.

The comments of Dan Keating addressed whether SWBT is complying with the checklist requirement of providing nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by SWBT at just and reasonable rates. Keating concluded that SWBT is not providing nondiscriminatory access to unbundled subloop elements or dark fiber. Keating also concluded that SWBT is not providing access to poles, ducts, conduits and rights-of-way equal in quality to the access SWBT affords itself and its affiliates. For example, SWBT's procedure includes sending overseers to CLEC job sites at the CLEC's expense and without notice, and charging pre-license survey costs at the CLEC's expense.

The comments of Denise Crombie addressed the Section 272 separate affiliate requirements. Crombie summarized the accounting and non-accounting safeguards that the federal Act and FCC Orders place on a BOC intending to provide in-region interLATA service. Chief among these safeguards is the requirement that a BOC is prohibited from offering in-region interLATA service except through a separate affiliate operating independently from the BOC. The separate affiliate is required to maintain separate books and records, to have separate officers, directors and employees, and to conduct all transactions with the BOC on an arm's length basis, reducing such transactions to writing, available for public inspection. In addition, the BOC is prohibited from discriminating in favor of its Section 272 affiliate in the provision of goods, services and exchange access. Crombie stated that SWBT has the burden of establishing section 272 compliance through tangible evidence. SWBT has had an affiliate in operation

known as Southwestern Bell Long Distance, and has engaged in numerous and ongoing transactions with SWBT. See SWBT's Response to AT&T Data Request No. 1.8, introduced as Exhibit 80 and designated highly sensitive confidential. SWBT has the burden of establishing that these numerous transactions comply with Section 272, according to Crombie.

The comments of Joe Gillan, Frederick Warren-Boulton and John Mayo all addressed the public interest considerations of granting SWBT interLATA relief. Gillan, Warren-Boulton and Mayo all concluded that prematurely authorizing SWBT to offer interLATA service before local competition exists is not in the public interest.

The comments of Edwin P. Rutan, Jr. outlined and addressed the requirements under the federal Act for a BOC to be granted interLATA relief. Specifically, the comments of Edwin Rutan discuss the purpose of Section 271(c)(1) and the requirements that it imposes to achieve that purpose. Section 271(c)(1)(A) is titled "presence of a Facilities-Based Competitor." The role of "facilities-based" competition in the federal Act is critical according to Rutan. A fundamental premise of the federal Act, just as it was in the divestiture decree ordered by Judge Greene, is that local monopoly facilities are a bottleneck and that if a Bell Operating company is permitted to provide long distance service while it retains that bottleneck control over an essential input to long distance service, it will have both the opportunities and the incentives to use its monopoly to discriminate against long distance carriers. Rutan stated that the federal Act ultimately does allow SWBT and the other BOCs into long distance, but not unless and until there is facilities-based competition. As to the standard for facilities-based competition, one thing is clear beyond dispute. Congress "consistently contemplated" that the facilities-based competition required by the federal Act must at least be "meaningful." H. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., at 148 (1996) (H. Conf. Rep.) If the facilities-based competition does not provide the necessary check on monopoly bottleneck power, it is not "meaningful" under the federal Act.

Rutan further stated that Section 271(c)(1)(A), generally referred to as Track A, sets up the procedure for ensuring that meaningful facilities-based competition has developed before long distance entry by a BOC, such as SWBT, is authorized. Track A is triggered when a carrier requests negotiations with SWBT in accordance with the requirements in Sections 251 and 252

of the federal Act. That carrier and SWBT subsequently enter into a binding interconnection agreement, either through negotiations or through arbitration. The interconnection agreement, whether arbitrated or negotiated, must be approved by the Commission. SWBT must reach one or more such agreements, the parties must bring them into commercial operation, and the competitive checklist must be fully implemented, before SWBT may be permitted into long distance. Section 271(c)(1)(B), generally referred to as Track B, provides that if no carrier requests interconnection, the BOC may 10 months after enactment, proceed with a statement of the terms and conditions that it generally offers for access and interconnection in lieu of an actual agreement. According to AT&T, there can be little doubt that SWBT understood that it was on Track A once these requests were received. For example, the agreements negotiated by SWBT and Brooks Fiber Communications of Tulsa, Inc. and Brooks Fiber Communications of Oklahoma, Inc. and the agreement between SWBT and USLD reflect that the competitors intend to provide local exchange service predominately over their own facilities.

AT&T maintains that Track A contains two distinct requirements, each of which SWBT must demonstrate that it satisfies. First, SWBT must actually be providing access and interconnection to a predominantly facilities-based, "competing" carrier pursuant to an approved interconnection agreement. Second, the access and interconnection must be provided in a manner that "fully implements" what is commonly referred to as the competitive checklist.

According to AT&T, the precise language chosen by Congress -- "is providing" -- makes it clear that Congress required actual commercial implementation of the agreement. "The requirement that the BOC 'is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational." (H. Conf. Report at 148). Thus, if the provision of access and interconnection is only being tested or "tried" or demonstrated, or is subject to capacity or quality limitations or manual overrides or work arounds, this requirement is not satisfied.

AT&T further took the position that interpretation of the terms "exclusively" or "predominantly" over its own facilities must begin with the purpose of the facilities-based competition requirement -- to serve as an effective competitive check to the local monopoly bottleneck. The facilities of a new entrant can serve as a competitive check only if they are a

meaningful alternative to the local monopoly bottleneck. Tract A also is not satisfied if the new entrant is not an "unaffiliated competing" provider. Thus, an entrant that is merely conducting a trial of or "demoing" its services is not yet "competing." Unless meaningful numbers of both "residential and business customers" are being served by facilities-based competition, Section 271 is not satisfied.

Edwin Rutan stated that it is not sufficient for SWBT to have entered into one or more interconnection agreements with a facilities-based carrier serving business and residence customers exclusively or predominantly over its own facilities. Section 271(c)(2)(B) requires that such access and interconnection must satisfy the fourteen point "competitive checklist." "Full implementation" of the checklist is required. § 271 (d)(3)(A)(i). According to Rutan, the term "implement" is defined in Merriam Webster's Collegiate Dictionary as follows: "1. CARRY OUT; ACCOMPLISH; esp: to give practical effect to and ensure of actual fulfillment by concrete measures" (Emphasis added) While Tract A has been opened by the requests for access and interconnection received by SWBT, none of the approved agreements, singularly or collectively, has brought full implementation of the competitive checklist. Rutan also stated that SWBT and other BOCs have argued that if they have not met the Tract A commercial operation requirement for one or more checklist items, they can cure that defect with an SGAT. That argument confounds both the clear structure of the federal Act and the policy on which it is based. There is no pick and choose or mix and match between Tract A and Tract B; they are mutually exclusive alternatives.

Rutan stated that SWBT and the other BOCs have argued in numerous public forums that Congress expected that facilities-based competition that would satisfy Tract A would have developed by now and that it would be unfair to require SWBT to wait until it does before they are allowed to enter long distance. Rutan stated that this argument not only misstates the expectation of Congress, but also conveniently overlooks the delay in facilities-based competition caused by SWBT's own tactics. AT&T stated that now, more than a year after the federal Act was adopted, it still has not been able to reach a comprehensive, operational agreement with SWBT in any state. Negotiation, followed by arbitration, has led to yet another round of negotiation, AT&T says.

Rutan concluded that SWBT has not met the requirements of Section 271(c)(1)(A) (Track A), that Section 271(c)(1)(B) (Track B) is unavailable, that SWBT has not met the public interest requirement, that SWBT has not complied with Section 272, and that SWBT has not implemented toll dialing parity.

Sprint Communications Company L.P. ("Sprint") Sprint filed pre-filed testimony of Edward K. Phelan and Cynthia Meyer on March 11, 1997. In addition to the pre-filed testimony, Sprint filed Comments as to the Relevant Inquiries to SWBT's Entry into the InterLATA Market in Oklahoma, as well as a Legal Memorandum concerning the application.

In its Comments, Sprint suggested that there are three general areas of inquiry that must be examined in evaluating SWBT's progress towards fulfilling the checklist set forth in the Act, and for development of a record to support the Commission's recommendation on SWBT's application to the FCC. The three areas include assessment of the competitive environment, assessment of the implementation of the competitive checklist and determination of the public interest. Sprint submitted two attachments to the Comments to assist the Commission in assessing the first two areas of inquiry. The attachments include suggested inquiries to determine the presence of facilities-based competition and to assess the competitive checklist. The second attachment is a copy of an appendix issued by the Florida Public Service Commission staff, which includes questions propounded to Bell South in a section 271 investigation. Finally, Sprint referred to Mr. Phelan's testimony for information regarding the determination of the public interest.

In its legal memorandum, Sprint suggests that section 271(c) requires that SWBT satisfy criteria under three broad, but interrelated categories. SWBT must show that (1) it has entered into an approved interconnection agreement with at least one unaffiliated competing provider of facilities-based service who is serving both business and residential customers; (2) it is providing access and interconnection pursuant to one or more interconnection agreements, and (3) it has satisfied the requirements of the 14-point competitive checklist set forth in section 271(c)(2)(B).

Sprint contends that because numerous providers requested interconnection from SWBT within the statutory time frame, SWBT can only comply with section 271(c) through Track A.

Sprint contends that the central characteristic of facilities-based competitors is their freedom from reliance on the incumbent LEC's facilities. In other words, there must be one or more competitors with sufficient market presence, in the form of their own facilities, to provide both local business and residential subscribers a meaningful alternative to SWBT. It is particularly important that such carriers own significant local loop facilities to avoid continued dependence upon SWBT. Sprint suggests that while Congress did not intend that the test under section 271 should turn on any specific quantitative measure of the CLECs' market presence, regulators should examine more generally whether the presence of competitive carriers in the local market demonstrates that in fact the barriers to local entry have been effectively lowered and genuine facilities-based competition has emerged, and effectively restrains the incumbent's ability to use its local monopoly to harm competition in the long distance market. According to Sprint, neither of these requirements has been met in Oklahoma because at present, there is only de minimis facilities-based competition in the state.

With respect to the requirements of Track A, Sprint suggests that the statute is satisfied only where one or more CLECs offer service to both residential and business subscribers either exclusively or predominantly over facilities that they own, and that unbundled network elements obtained from the incumbent cannot be counted as a CLEC's own facilities. Sprint refers to indications of Congress' expectation that facilities-based carriers would provide service over facilities actually owned by the CLEC by its repeated examples of the cable industry which has an extensive network already in place. Sprint also contends that the term "predominantly" over one's own facilities means substantially more than 50%, and requires ownership of more than 50% of local loop and switching facilities.

Sprint also states that SWBT cannot meet the requirements of section 271(c)(1)(A) by merely entering into one or more interconnection agreements. Instead, SWBT must prove that facilities-based competitors are in fact operational in the local market and that SWBT has fulfilled each of its obligations to enable additional entry and expansion. Sprint reasons that use of the present tense "is providing access and interconnection" in the statute indicates Congressional intent that a BOC must have received and satisfied service requests from the new entrants, and actually be exchanging traffic with them. Sprint also notes the difference in